

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

BRIAN KENNEDY,

Respondent.

HUDALJ 91-1644-DB
Decided: February 21, 1992

Brian Kennedy, *pro se*

Louis Smigel, Esquire
For the Government

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

On January 18, 1991, the Assistant Secretary for Public and Indian Housing of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") proposed to debar Brian Kennedy ("Respondent") pursuant to 24 CFR 24.305(b), (d), and (f). The proposed debarment is based on information which indicates to the Department certain irregularities concerning Respondent's actions when he served as a Management Consultant-Housing Specialist for the Housing Authority of the City of Passaic, New Jersey ("the Authority"). This action would exclude him from primary covered transactions and lower-tier covered transactions, as either a participant or principal at HUD and throughout the Executive Branch of the Federal government, and it would prohibit him from participating in procurement contracts with HUD. HUD proposes to debar Respondent for three years from January 22, 1990, the date of a Limited Denial of Participation ("LDP") previously issued to him by the HUD Newark Office Deputy Manager. Pending the outcome of any hearing on the debarment, HUD also suspended Respondent from participating in such transactions and contracts, effective January 18, 1991. The suspension supersedes the LDP.

By letter dated February 24, 1991, Respondent requested a hearing on the proposed debarment. An Order dated March 12, 1991, established a schedule for the filing of the Government's Complaint and the Respondent's Answer. Those pleadings were timely filed, and on May 13, 1991, an Order was issued which established the time and place for a hearing. That hearing was held on June 25-26, 1991, in New York, NY.

In accordance with an oral Order issued at the end of the hearing, an Order was issued on August 5, 1991, setting forth a schedule for the filing of post-hearing briefs. Those briefs were timely filed. Accordingly, this matter is ripe for decision.

Findings of Fact

I. Background

HUD provides federal assistance to local housing authorities to maintain decent, safe, and sanitary housing for families of low income. 42 U.S.C. sec. 1437, *et seq.* Such assistance includes operating subsidies under Section 1437g and Comprehensive Improvement Assistance Payments ("CIAP") under Section 1437f. (Joint Ex. 1, Stip. No. 1).¹ Pursuant to Section 1437f(b), HUD is authorized to grant funds to public housing authorities for the purpose of improving the physical condition of low-rent projects and for upgrading the management and operation of such projects to the extent necessary to maintain the physical improvements. A program operated pursuant to Section 1437f is referred to as a CIAP, or modernization, program. (T 408).

Congress has authorized HUD to enter into contracts with public housing agencies which may contain any terms and conditions necessary to ensure the low income character of the projects involved. 42 U.S.C. sec. 1437d(a). Such contracts are known as Annual Contributions Contracts ("ACC"). A congressional requirement is that every ACC provide, *inter alia*, that the public housing agency shall comply with HUD procedures and requirements to ensure sound management and operation of the project. *Id.* at sec. 1437d(c)(4). Upon occurrence of a substantial breach of the contract by the public housing agency, HUD is entitled to take possession of the agency's assets. *Id.* at sec. 1437d(g)(1). See also Joint Ex. 1, Stip. No. 2.

The Authority is a municipal corporation created pursuant to the New Jersey Local

¹The stipulations of fact entered into by the parties were admitted into evidence as Joint Exhibit 1. That exhibit is cited herein as ("Joint Ex. 1, Stip. No. ____"). Capital letter T stands for the transcript of the hearing, and the number refers to the transcript page. The Department's exhibits are cited with a capital S and an exhibit number, and the Respondent's exhibits are cited with a capital R and an exhibit number. In some cases, a page number follows an exhibit number and the word "at."

Housing Authorities Law, N.J.S.A. 55:14A-1, *et seq.*, and is responsible for the operation of low-income public housing projects pursuant to 42 U.S.C. sec. 1437, *et seq.* As a body corporate and politic, the Authority's powers are vested in a Board of Commissioners pursuant to N.J.S.A. 55:14-A-6. (Complaint, para. 4).²

The Public Housing Administration, of which HUD is the successor agency, and the Authority entered into an ACC on June 12, 1962. (Complaint, para. 8). The Authority agreed to administer its projects in an efficient and economic manner. Pursuant to amendments to the ACC which provided for CIAP funding, the Authority agreed to administer its CIAP program in compliance with applicable regulations and HUD procedures (Complaint, para. 9).

Beginning on February 14, 1989, the HUD Office of Inspector General, Office of Audit, Region II, New York, NY ("OIG") conducted a review of the Authority, with particular focus on the Authority's CIAP program. The site work for the audit was completed in September 1989. The audit covered the Authority's activities from January 1, 1986 through December 31, 1988, but was extended to prior and subsequent years to determine the extent of certain deficiencies. (S 13 at 2; T 18-22).

An Audit Report was issued on January 19, 1990. The Report included the following findings: (1) the Authority had paid salaries for multiple job titles with the CIAP program to Authority employees who held other full-time positions (S 13 at 3-13; T 23-37, 57-59); (2) the Authority had represented to HUD that certain CIAP funds were obligated when they had not been (S 13 at 14-17; T 38-58); and (3) the Authority's CIAP salaries had been prorated based upon budget estimates, rather than being based upon actual records of time spent (S 13 at 18-19; T 59-61).

² See 24 CFR 26.11 ("Allegations are admitted when not specifically denied in respondent's answer").

Applicable federal statutes and regulations as well as the ACC and provisions of the applicable HUD Handbook were violated by the Authority. The Authority's payment of salaries for multiple job titles as set forth in audit finding number 1 constituted excessive, unreasonable and unauthorized compensation to Authority employees (Joint Ex. 1, Stip. No. 8). For example, in one year, Paul Marguglio, the Authority's Executive Director, received \$161,675 in salary for the positions of Executive Director, Modernization Officer, Contracting Officer, and Purchasing Agent. This amount is nearly twice the annual salary budgeted for his basic position of Executive Director. Donald Pieri, the Authority's Deputy Executive Director, received \$111,505 in one year for acting as Deputy, Modernization Specialist, and Public Agency Compliance Officer. Other employees, including relatives of Marguglio, also held multiple positions and received salaries in excess of amounts approved by HUD. The Authority's Board of Commissioners approved resolutions authorizing these payments (Joint Ex. 1, Stip. No. 4). Such payments were substantial violations of the ACC.³ (Joint Ex. 1, Stip. No. 8).

³Under Section 101 of its ACC with HUD, the Authority agreed to administer its projects in an efficient and economic manner. Under Section 201, the Authority agreed to operate each project at all times "in such manner as to promote serviceability, efficiency, economy and stability...." The Authority also agreed in Section 307(A) to limit compensation of personnel to amounts comparable to pertinent local practice. (Joint Ex. 1, Stip. No. 3).

With regard to audit finding number 2, HUD Handbook 7485.1 REV-3 (Jan. 1988) ("HUD Handbook") provides that CIAP funds may only be shown as obligated when CIAP contracts are awarded. The Authority submitted reports to HUD showing that \$3,377,190 was obligated under the Authority's CIAP project designated as NJ 13-911 when in fact only \$1,955,050 was obligated. (Joint Ex. 1, Stip. No. 5). With regard to the third audit finding, pursuant to the HUD Handbook and OMB Circular A-87 ("OMB Circular"), a public housing authority may not prorate salaries among CIAP and other housing programs based on budget estimates. Salary proration must be based upon time distribution records. (Complaint, para. 14).⁴

As a result of the findings contained in the Audit Report, HUD's Assistant

⁴Respondent argues in his post-hearing brief that the HUD Handbook and the OMB Circular do not support a finding that proration of salaries must be based on time distribution records rather than budget estimates. See Respondent's Brief at 43-45. Respondent proffers this argument in an attempt to rebut the hearing testimony of two Government witnesses, Eduardo Escobar and William Elias. (T 58, 65, 453). Respondent attached as exhibits to his brief copies of the HUD Handbook and OMB Circular. See Exhibits D and E to Respondent's Brief.

Respondent's argument concerning the appropriate basis for proration of salaries is raised for the first time in his post-hearing brief. He did not elicit any testimony from any witness during the hearing to rebut Escobar's and Elias' testimony. He also did not seek admission of the HUD Handbook and OMB Circular into the record at the hearing. Indeed, the Department specifically alleged the factual finding at issue in its Complaint, and Respondent did not deny that allegation in his Answer. Thus, under the applicable HUD regulations, Respondent is deemed to have admitted the allegation. See *supra* n.2.

Even if it were permissible to revisit the Department's allegation concerning the proper basis for proration of salaries, including a consideration of the HUD Handbook and OMB Circular, Respondent has not successfully refuted the allegation. As argued by Respondent, the HUD Handbook at para. 2-7 does not expressly provide that proration of salaries must be based upon time distribution records rather than budget estimates. That provision simply states that "[a]ny proration of salaries must be justified by the [public housing authority], authorized by the Field Office and reflected by an appropriate revision to the PHA's operating budget." Moreover, as argued by Respondent, the OMB Circular provides that "salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records", and the Handbook at para. 1-4 provides that "[b]eginning with FY 1987, modernization funds are provided through grants not loans." However, where Respondent's argument falters is his assertion that because "[t]he entire thrust of the charges against [him] involve the [Authority's] CIAP program for fiscal year 1986", the OMB Circular requirement concerning time distribution records "is inapplicable to the core of charges against [him]." See Respondent's Brief at 45. (Emphasis in original).

It is unclear whether Handbook para. 1-4's statement "beginning with FY 1987" refers to projects designated as FY 1987 and beyond, or all projects, regardless of their fiscal year designations, which receive funds in FY 1987 and beyond. Respondent, therefore, has proffered an insufficient basis upon which to conclude that the entirety of his conduct as it pertained to salary proration was not subject to the time distribution record requirement of the OMB Circular, when applied in conjunction with the HUD Handbook.

Secretary for Public Housing issued letters of suspension and proposed debarment to the Authority's Chairman of the Board of Commissioners and others.⁵ HUD also declared a substantial breach under its ACC with the Authority, and obtained an Order from the United States District Court for the District of New Jersey allowing it to take over the Authority's assets. (Joint Ex. 1, Stip. No. 6). Several employees of the Authority have also pleaded guilty to federal felony charges in connection with the events described above. These charges included: the payment of kickbacks by the Authority's counsel, August Michaelis, to the Executive Director, Marguglio; lying to Congress; lying to HUD officials about the multiple job positions; and destroying Authority records. (Joint Ex. 1, Stip. No. 7).

II. Respondent's Conduct as the Authority's Management Consultant-Housing Specialist

⁵ See, e.g., *In the Matter of William P. Scruggs*, HUDALJ 90-1459-DB (April 1, 1991) (affirming proposed five-year debarment of former Vice Chairman of Board of Commissioners of Authority).

In 1987, 1988, and 1989,⁶ Respondent worked for the Authority as its Management Consultant-Housing Specialist, particularly with regard to the CIAP program. (Complaint, para. 15; S3, S14(A), S14(B); T 122, 175-76). Prior to his employment as a management consultant, Respondent had been employed by HUD at its Newark, New Jersey office from 1970 to 1983. (Complaint, para. 17; Answer, para. 17). Respondent first worked for HUD OIG, and since at least 1972, served as a housing management specialist for the HUD Newark Office's program staff, overseeing public housing authorities. (T 121, 174-75, 238). He reviewed and approved public housing authority budgets and provided technical assistance to public housing authorities on their budgets. (T 121, 238-39, 405). He performed his duties well and competently, and was considered an "excellent employee and very knowledgeable of HUD programs" (T 121-22, 237-39, 406). Respondent had been employed by the United States Internal Revenue Service prior to working for HUD. (T 238).

Respondent was paid by the Authority on a *per diem* basis. For the years 1987, 1988 and 1989, Respondent was paid \$25,700, \$30,500 and \$36,750, respectively. (S3, S14(A), S14(B); Complaint, para. 16; Answer, para. 16). He has worked for five other housing authorities in New Jersey as a consultant in addition to working for the Authority. (T 130, 239-40, 406). Respondent's contracts with the Authority provide that he was responsible, *inter alia*, for: preparation of budget revisions and modernization correspondence in conjunction with Authority staff modernization budgets; participation in the preparation of CIAP modernization applications, HUD on-site application reviews and final applications; preparation of supplemental schedules to the annual operating budget in conjunction with the Authority's public accountant; review of all HUD notices, handbooks and directives to insure the Authority's compliance with HUD rules and regulations; and participation in all HUD on-site financial, occupancy and management reviews. (S14(A), S14(B)). Respondent served as the Authority's advisor on CIAP programs, and in that capacity, worked closely as a team with Marguglio, the Authority's

⁶The precise dates of Respondent's service as a Management Consultant-Housing Specialist for the Authority are not established by the evidence. Respondent states in his Answer, "I wrote the agreement for duties between myself and [the Authority] in 1983-84." (Answer, para. 30). However, the Department's allegations concern Respondent's conduct during 1987 to 1989, and Respondent does not deny that he worked for the Authority during that time. (Answer, paras. 15 and 16). The only documents admitted into evidence at the hearing which directly reflect his period of service with the Authority are S3, S14(A) and S14(B). On September 10, 1987, the Authority's Board of Commissioners adopted a resolution authorizing, *inter alia*, "[t]he Executive Director...to engage, by contract, the Management Consultant-Housing Specialist (Brian Kennedy)...." (S3). (The record does not include a contract for calendar year 1987.) On January 1, 1988, and again on January 1, 1989, Respondent entered into consulting contracts to provide services through December 31, 1988 and December 31, 1990, respectively. (S14(A), S14(B)).

Executive Director, and Pleri, the Deputy Executive Director. (T 241, 407).

Respondent's conduct as it relates to the three OIG audit findings discussed above, both prior to and during the audit, is set forth in the following findings:

A. Payment of Excessive Compensation to Authority Employees Holding Multiple Job Titles

1. The Authority's Staffing Plan and HUD Newark Office's Review

On or about May 11, 1988, the Authority submitted to the HUD Newark Office a requisition for CIAP funds for project NJ13-911/Fiscal Year ("FY") 1986. The requisition was not signed, and attached to it was a handwritten, unsigned list of positions and salaries (S 18). Respondent prepared the requisition.⁷ Pursuant to a letter dated May 23, 1988, HUD requested more information, including a "[c]opy of the [Authority's] periodic payroll report listing employees, time allocated to C.I.A.P., and the charge to be reimbursed." As stated in the May 23rd letter, the May 11th submission included "a pencil listing of employees and a salary proration without any indication of the relevant time period." (S 19; T 181).⁸ In response to HUD's May 23rd request, the Authority submitted a typed, unsigned list of the positions and prorated salaries being charged to the CIAP program for NJ13-911 for May 1988 entitled "CIAP Sub-schedule

⁷In his Answer, Respondent states that "[b]eginning in May, 1988, I prepared requisitions under HUD's new Rapid Housing Payment System." According to Respondent, "[t]he [OIG] audited more than \$6,000,000 of these requisitions processed between May, 1988 and September, 1989 and did not note any improprieties." (Answer, para. 15). See also Answer, paras. 19, 37. Respondent himself represents in his post-hearing brief that the Rapid Housing Payment System was implemented in HUD's New York Region II, which includes the Newark Office, on May 1, 1988. See Respondent's Brief at 6. While not dispositive, in his post-hearing brief, Respondent does not explicitly deny having prepared the May 11, 1988 requisition. He also does not identify the person(s) who prepared that document if he did not -- a fact it is reasonable to conclude he would have known in his capacity with the Authority. Accordingly, I find that Respondent prepared the May 11, 1988 requisition. There is no evidence, however, upon which to base a finding that Respondent prepared or participated in the preparation of the attached list.

⁸Requisitions were processed by HUD pursuant to the Rapid Housing Payment System ("RHPS"). Under RHPS, requisitions for administrative or "soft" costs attributed to salaries are approved by HUD based on a sample payroll submitted by the housing authority and kept on file with HUD. No further documentation is required from the authority, unless major changes occur. (T 252-53). In comparison, in requisitioning "hard" cost or capital improvement items, a housing authority generally employs an inspecting architect who certifies that the request for payment from a contractor represents work that was actually done. At the end of the project, a HUD engineer performs a final inspection to determine that the work has been completed in an acceptable manner. Before HUD will approve the final payment on a CIAP contract, the HUD engineer must be satisfied on final inspection, and the housing authority must also find the project satisfactory. (T 409-10, 250-51, 289-90, 410-11, 458-59).

S, Salary Schedule" ("CIAP Subschedule"). (S 20).⁹

⁹The Department does not allege, nor is there any hearing testimony or other evidence, that Respondent prepared or participated in the preparation of the CIAP Subschedule (S 20). Indeed, in its Brief, the Department limits inclusion of S 20 to one of a series of chronological events. See Department's Brief at 17-18.

By letter dated July 1, 1988, the HUD Newark Office notified Marguglio that it was in receipt of the Authority's budget revision for, *inter alia*, NJ13-911, and that the revision had been approved. (S 21). The Newark Office stated that although the revisions were approved without change, it was "concerned about the percentage of modernization funds being charged to the Administrative Account and to other soft costs."¹⁰ HUD found that administration, which includes salaries, was 11.8 percent of physical improvements. Total soft costs as a percent of physical improvements was 27.7 percent. The Newark Office advised that although it had no specific limitation for administrative and other soft costs, these percentages were "rather high" in comparison to budget amounts submitted by other housing authorities with similarly sized CIAP programs. Accordingly, the Newark Office advised Marguglio that in the interest of ensuring "equitable distribution of funds among all Housing Authorities in the state," the Authority's "administrative expenses should be held to amounts in these approved budget revisions and other previously approved modernization budgets." (S 21; T 185-87).

The Authority submitted a Modernization Organization and Staffing Plan ("Staffing Plan I") to HUD as part of its final CIAP application for FY 1988. Staffing Plan I was prepared by Respondent. (S 32; T 269-71).¹¹ The HUD Newark Office advised Marguglio by letter dated August 2, 1988, that Staffing Plan I was not acceptable since it did not "accurately and sufficiently describe [the Authority's] modernization program staffing." The Newark Office further stated that the Authority should submit a revised plan, as required by HUD Handbook 7485.1 REV-3, which would explain the staffing for the modernization program, "including the names, titles, duties, and salaries of technical and non-technical personnel to be assigned full-time or part-time to modernization." The Newark Office also stated that the Authority's Board of Commissioner's Resolution (S 1) "is not acceptable since it is dated September 11, 1986." (S 22; T 186-87). In response to the Newark Office's request, HUD received a revised Staffing Plan ("Staffing Plan II"), with a cover letter dated August 8, 1988, signed by Marguglio, but prepared by Respondent. (S 23; T 190).¹² On Staffing Plan II, the positions of CIAP Modernization Officer and Modernization Specialist were marked "Pending Funding." Joseph Girardo, the Newark Office Housing Management Specialist

¹⁰As discussed *supra* n.8, soft costs are administrative costs such as salaries, some management improvements and legal fees. Hard costs are capital improvement items. (T 246, 427).

¹¹Respondent stipulated at the hearing that he prepared Staffing Plan I. (S 32; T 269). The actual Staffing Plan I submitted to HUD was not introduced into the record. S 32 is Respondent's draft of the document put into final form and ultimately submitted by the Authority to HUD. (T 270-71).

¹²Respondent stipulated at the hearing that he prepared the cover letter to Staffing Plan II (S 23). He did not stipulate that he prepared Staffing Plan II. (T 190). The Government does not allege, nor is there any hearing testimony or other evidence that he prepared Staffing Plan II.

assigned to the Authority, determined that these were the two highest paid positions on Staffing Plan II. He reached that conclusion by referring to the CIAP Subschedule that had been previously submitted by the Authority. (S 20, S 23; T 188-89).

During the second of two conversations, Pieri, the Authority's Deputy Executive Director, informed Girardo that those positions were encumbered by "Glover" and "Russi", respectively, but that he did not know what their duties were. (S 24; T 189-90, 192).¹³ Girardo and his superior, William Elias, the Chief of the Assisted Housing Management Branch, were concerned that the two positions were "phantom jobs" (T 191, 193, 434). On or about August 18, 1988, the HUD Newark Office decided to conduct a "site monitoring visit" of the Authority before referring the matter to OIG. (S 24; T 191, 193).

Girardo advised Respondent during a telephone conversation that took place on or about August 19, 1988, of the Newark Office's concerns regarding its intention to conduct a "site monitoring visit." Respondent objected because he felt the Authority was entitled to decontrol¹⁴ and had undergone sufficient review. When Girardo advised Respondent that Pieri could not say what Glover and Russi did, Respondent stated that he thought Glover had retired.¹⁵ Respondent "was not very familiar with these employees and could not tell [Pieri] what they did with respect to the [CIAP] program." (S 24; T 192-98).

In a series of five letters to the Newark Office that were written in September and October 1988, the Authority set forth its objections to the "in depth" review it believed was being sought by HUD. The letters were signed by Marguglio or Pieri, but were written by Respondent. (S 25(A)-(E); T 201). In the last of the letters, the Authority set forth its position that a lesser, limited management review could commence four to eight years after July 25, 1988. (S 25(E)). The Authority ultimately agreed to a limited management review, and by letter dated November 9, 1988 from Marguglio, but written

¹³When approached by Girardo, Pieri first reiterated that the positions were "pending funding", but when Girardo pointed out that those positions, even if then currently vacant, had received funds under the Authority's prior CIAP program, Pieri could not say who had formerly held the positions. Pieri then said he would have to speak with Marguglio. It was at that point, when Pieri called Girardo back, that he told Girardo that Glover and Russi held the positions, but that he did not know what duties they performed. (T 189-90).

¹⁴A public housing authority can be granted decontrol status by HUD based on the application of certain performance standards. When granted that status, an authority is relieved from certain review and paperwork requirements. (S 25(A)-(E); T 198).

¹⁵Girardo could not recall what, if anything, Respondent said about Russi. (T 197).

by Respondent, the Authority provided responses to certain questions concerning the review. (S 26; T 198-202, 205-06).

The limited management review was conducted during November 1988. Girardo again inquired about the two positions during a November 15, 1988 review meeting attended by representatives of the HUD Newark Office, and Marguglio, Pieri, and Respondent. When Marguglio advised Girardo that Glover was "incompetent, nearing retirement", that the Authority "didn't want to hassle with the Civil Service process to deal with him," that charging the positions to the CIAP program was "just the easy way to do it," and that he should not be given a "hard time just because they did it that way,"¹⁶ Respondent said nothing. (T 203-04).¹⁷ Another meeting was held on November 29, 1989, but Respondent did not attend. (S 29; T 206-07). At that meeting, the Authority promised to provide full access to its records after the HUD Newark Office personnel performing the review expressed their concerns that the Authority was not providing such access. The HUD Newark Office issued a report dated December 28, 1988 concerning the limited management review.¹⁸ The report did not indicate that the Authority had not fully cooperated in the review because the Authority had promised full access to its records. (T 223-30).

2. Operating Budget Salary Schedule

During its audit, HUD OIG inquired into the Authority's payment of multiple salaries for multiple positions from sources including the Authority's CIAP program. Respondent and Emil Moretti, the Authority's Chief of Operations, were designated by the Authority to act as its liaisons with HUD OIG. (T 20). At the OIG audit entrance conference held on February 14, 1989, the Authority advised OIG, in Respondent's presence, that the positions of CIAP Modernization Officer and Modernization Specialist

¹⁶Girardo could not recall what Marguglio said about Russi. (T 203-04).

¹⁷According to Girardo, Respondent's participation in the meeting was limited to some initial remarks concerning the Authority's objection to the review. When asked whether Respondent said anything after Marguglio commented on Glover, Girardo responded, "I don't recall much else said by Mr. Kennedy after that initial, you know sequence." (T 202-04).

¹⁸Although the report was not introduced into the record during the hearing, Respondent relies on its content in his post-hearing brief. Respondent asserts that it is "a public document of which Court [sic] can take judicial notice." See Respondent's Brief at 34, n.190. The report is not a document for which the taking of official notice is appropriate. Moreover, even if the taking of official notice could be contemplated, the manner in which Respondent sought its inclusion does not provide the Department with the requisite opportunity to respond. Accordingly, the report attached to Respondent's Brief as Exhibit C is not part of the record evidence considered in reaching this Initial Determination.

"were never filled by the Authority" and that they were "pending funding and this was a misunderstanding between HUD and the [Authority] and that they were not going to be filled." (T 20-21).¹⁹

The Authority's Operating Budget is the document by which the Authority shows the income it expects to receive and the expenses it expects to incur during a particular fiscal year. Salaries are one routine expense set forth in the Operating Budget. Attached to the Operating Budget are supplemental schedules which set forth the bases for the numbers which appear on the Operating Budget. The Authority's positions and salaries are set forth on a supplemental schedule. (T 258, 287, 427-29).

Respondent provided OIG with a copy of the Authority's Operating Budget Schedule of All Positions and Salaries ("Operating Budget Salary Schedule"). (S 4;

¹⁹Escobar, the Area Audit Supervisor for HUD OIG who performed the audit and testified as to the entrance conference, did not recall who from the Authority made these statements. (T 20-21).

T 104). That document, sets forth the Authority's positions and salaries, as well as a breakdown of how those salaries were allocated to the Authority's various programs, including CIAP, for the year ending December 31, 1988. Respondent was responsible for preparation of the Operating Budget Salary Schedule.²⁰

When first provided to OIG, the Operating Budget Salary Schedule did not identify the persons who encumbered the listed positions (T 104). The document was analyzed by OIG, and then returned to Moretti to fill in the names of the employees holding the positions. The document was again given to OIG by Respondent, with the names of the employees who held the positions this time included. The document showed that compensation was being paid to employees, including Marguglio, Pieri and Moretti, who held full-time positions for the Authority while at the same time receiving additional salaries from the CIAP budget. At the time Respondent gave the annotated document to OIG, he acknowledged that several Authority employees were holding multiple positions. Respondent justified the multiple positions and payments by referring to the Authority resolutions which authorized the additional compensation.

(S 1, S 2; T 105).²¹ OIG concluded, *inter alia*, that in 1988 Marguglio, Pieri and Moretti received \$36,000, \$24,000 and \$9,600, respectively, in compensation from the CIAP program in addition to the salaries they received for their full-time positions with the Authority. (S 1, S 2, S 3; T 24-27, 30-35).²² To fulfill all the duties for which they

²⁰ Respondent's contracts with the Authority provide that he was responsible for "preparation of supplemental schedules to the annual operating budget in conjunction with the Authority's public accountant." (S 14(A), S 14(B)). Both Marilyn Freiser, who from 1982 to 1990 was a supervisory housing management specialist with the HUD Newark Office, and William Elias, who from 1987 to 1990 was Chief of the Newark Office's Assisted Housing Management Branch, testified that the term "supplemental schedules" as referenced in Respondent's contracts is understood to include the Operating Budget Salary Schedule. (T 255-58, 285-87, 433, 467-68). They did not testify, however, nor does the Department allege, that Respondent prepared the Operating Budget Salary Schedule. See Department's Brief at 12-14. Moreover, Escobar of HUD OIG testified that he did not believe Respondent prepared the Operating Budget Salary Schedule, which was not a CIAP form. (T 93-94). Accordingly, although there is insufficient evidence upon which to base a finding that Respondent prepared or participated in the preparation of the Operating Budget Salary Schedule, I find that Respondent was responsible for its preparation.

²¹ In response to the question posed by the court as to whether Respondent objected to receipt into evidence of the Authority's Board of Commissioners' Resolution dated September 11, 1986 (S 1), Respondent represented that he had no knowledge of that Resolution until he provided it to Escobar. (T 25-26). Although Respondent's representation does not constitute sworn testimony, I find it reliable and credible. Respondent made no representation at the hearing as to his knowledge of the Authority's Board of Commissioners' Resolution dated November 6, 1986 (S 2). (T 27-28). However, there is no evidence that he knew of that resolution prior to providing it to Escobar.

²² Escobar of OIG testified that the services had actually been performed, and that the amounts paid to

were being paid, Marguglio, Pieri and Moretti would have needed to work 266.6, 233.3 and 233.3 percent of the time, respectively. (S 13 at 4-5).

3. CIAP Monthly Salary Schedule

Marguglio and Pieri from the CIAP program were "unusual" insofar as they were in addition to regular salaries. (T 65, 71, 77-78). Elias of the Newark Office testified that the salaries paid to Marguglio and Pieri from the CIAP program would not have been unusual amounts had an appropriate reduction been made to other salary sources. (T 465). Girardo of the Newark Office testified that the amounts paid to Marguglio and Pieri out of the CIAP budget seemed unusually high because, typically, the majority of their salaries as executive director and deputy executive director would have already been paid out of the operating budget. (T 210-12).

While HUD OIG was performing its site work for the audit, the Authority submitted to HUD's Newark Office a handwritten document entitled "Monthly Allocation of Salaries" for the Authority's CIAP Program ("CIAP Monthly Salary Schedule"), with an attached cover letter dated May 31, 1989. (S 30). Both the CIAP Monthly Salary Schedule and the cover letter were prepared by Respondent. (T 262).²³ The CIAP Monthly Salary Schedule was submitted as supporting documentation for requisitions for administrative costs charged to, *inter alia*, NJ13-911. (S 28). These requisitions were also prepared by Respondent. (T 253).²⁴ In a May 26, 1989, letter from the HUD Newark Office to Marguglio, the Authority had been reminded to submit "a revised CIAP payroll, with accurate prorations, on which to base [the Newark Office's] subsequent reviews of [the Authority's] CIAP requisitions." (S 29).

The CIAP Monthly Salary Schedule sets forth positions, names of employees holding those positions, and the salaries for those positions prorated to the Authority's three CIAP programs (NJ-911, 912, 913). That schedule did not include, *inter alia*, the positions of CIAP Modernization Officer and Modernization Specialist, which were the two highest paid positions in the Authority's CIAP program. The schedule stated only that Marguglio was the Executive Director and Pieri was the Deputy Executive Director. (S 30).

As discussed above, the OIG audit revealed that the positions of CIAP Modernization Officer and Modernization Specialist were held by Marguglio and Pieri, respectively, and that those were among the positions for which Marguglio and Pieri received multiple salaries. After receiving the CIAP Monthly Salary Schedule, the HUD Newark Office, by letter dated June 27, 1989, approved with modifications the requisitions for administrative costs submitted by the Authority. (S 31; T 489-93).²⁵

²³ Respondent stipulated at the hearing that he prepared the CIAP Monthly Salary Schedule and cover letter. (S 30; T 262).

²⁴ Respondent stipulated at the hearing that he prepared the requisitions. (S 28; T 253).

²⁵ In reviewing the requisitions, the Newark Office concluded that the Authority had insufficient funds remaining in its administrative account to cover the requested amounts. Accordingly, the Newark Office reduced the amounts requested, and advised the Authority as to how much CIAP funds remained. The Authority then had the choice of revising and reducing future prorations or submitting a budget revision to HUD to cover additional costs. (T 265-269).

B. Misrepresentation of Obligated CIAP Funds

By letter dated May 14, 1987, the Authority was notified by its engineering contractor, LAN Associates, concerning tests that had been done regarding "underground heat line replacement" at an Authority site. According to LAN Associates, the tests were done "to ascertain the condition of the underground pipes which consist of a steam supply, condensate return, hot water supply, hot water circulating, and electrical control conduit within each pipe vault." At one test site, "[t]he pipes were found to be in excellent condition...." At another site, "digging...revealed that the domestic cold water line and the fire water line appear to be in satisfactory condition." Another test was planned, but not yet performed, "to observe the heat lines and the domestic hot water lines." LAN Associates concluded in the letter that "[i]t would appear that the underground heat line renovation could be held in abeyance at this time and repairs made only if an emergency should occur."²⁶ The letter was sent by LAN Associates to Pieri's attention, with copies to Margaglio and others, but not to Respondent. (S 10).

By letter dated August 19, 1987, the HUD Newark Office advised Pieri that "it is imperative that all 1986 CIAP funding which was designated 'emergency' be obligated by December 30, 1987; otherwise it will be recaptured." (S 8; T 47).

Representing funds as "obligated" means a contract has been awarded, the performance of which will result in an expenditure of funds. For funds to be obligated, they must first be approved by HUD. Approved funds are set forth as budget line items and are subject to change by HUD. If approved funds are not obligated, they can be recaptured by HUD, or with HUD's approval, can be otherwise used by the housing authority. (T 40-41, 84-85, 99, 101-02, 112, 115). For approved and obligated funds to be expended by a public housing authority for hard cost items, the authority must request funds from HUD to pay for work that has been completed. Requests are submitted by virtue of requisitions which are processed by HUD pursuant to the RHPS. HUD can retrieve funds that had been "obligated" for hard cost items in that it can stop payment on a contract for work it has reviewed and deemed unsatisfactory. (T 117-118).

See also supra n.8.

²⁶No other evidence concerning "heat line replacement", including subsequent correspondence from LAN Associates to the Authority, was introduced into the record.

The Authority's CIAP budget was its forecast, or projection, of the manner in which it planned to spend CIAP funds. Revisions to the budget were the means by which the Authority showed any subsequent changes regarding its projected expenditures of such CIAP funds. Both the budget and any revisions were subject to HUD approval. (T 43, 46, 49, 243). At least four budget revisions were submitted by the Authority to the HUD Newark Office for CIAP project NJ13-911/FY 1986. At least two of these documents, Budget Revision II, dated October 20, 1987, and Budget Revision III, dated May 31, 1988, were prepared by Respondent. (S 6, S 7; T 44, 48). Budget Revision IV was dated February 3, 1989.²⁷ (S 9; T 51).

The Authority also submitted a Schedule/ Report of Modernization Expenditures CIAP NJ13-911/FY 1986 ("Quarterly CIAP Report"), dated January 15, 1988. (S 5).

In the Quarterly CIAP Report, the Authority represented to HUD, *inter alia*, which funds it obligated for FY 1986. (T 39, 240, 408). The report was signed by Marguglio, but Respondent prepared it or participated in its preparation. (T 240, 281-83, 408).²⁸

²⁷No document designated "Budget Revision I" was introduced into the record. Although Respondent stipulated that he prepared Budget Revisions II and III, there was no stipulation as to Budget Revision IV. However, Respondent's contracts with the Authority provide that he was responsible for preparation of budget revisions. (S 14(A), S 14(B)). Thus, although there was no testimony or stipulation that he prepared Budget Revision IV and the Department does not assert he did, at a minimum, he was ultimately responsible for its preparation. See Department's Brief at 24-27.

²⁸Escobar of HUD OIG testified that he did not think Respondent prepared the Quarterly CIAP Report. Escobar testified that he believed the Authority's accountant prepared the Quarterly CIAP Report. He based his belief on "conversations that took place during the audit" and on his view that the report is "basically an accounting function." (T 96-98, 117). However, Girardo, Freiser and Elias testified that they believed Respondent prepared or participated in the preparation of the Quarterly CIAP Report. (T 176, 240, 242, 281-83, 408).

From 1987 to 1989, Girardo was a housing management specialist with the HUD Newark Office and in the Spring of 1988, was assigned in particular to the Authority. (T 173). As discussed *supra* n.20, from 1982 to 1990, Freiser was a supervisory housing management specialist with the HUD Newark Office. Freiser was Girardo's supervisor. During 1987 to 1990, Elias was Chief of the Newark Office's Assisted Housing Management Branch and as such, was Freiser's supervisor. All three had direct contact with Respondent concerning the Authority's CIAP programs while Respondent was a consultant. Girardo had "[a] variety of contacts" with Respondent, "[m]ainly concerning the [Authority's] CIAP Program." Elias' contact was "from time to time" and consisted of telephone conversations. Freiser's contact included visits to the Authority "on many occasions." (T 173-76, 240-42, 406-07). Girardo testified that to his knowledge, Respondent worked "possibly to some extent on quarterly reports for [the CIAP] program." (T 176). Freiser testified that her belief that Respondent prepared the Quarterly CIAP Report was based upon discussions her staff had with the Authority, which her staff had related to her. (T 281-83). Elias testified that Respondent's duties "as we understood them, included the preparation of...modernization correspondence", and that modernization correspondence included a quarterly CIAP report. (T 459-60).

Escobar's function was to audit the Authority, rather than Respondent individually. In comparison,

In Budget Revision II, which was submitted by the Authority subsequent to its receipt of the letters from LAN Associates and the HUD Newark Office discussed above, the Authority projected a total of \$999,960 for Asbestos Removal, \$380,000 for Exterior Masonry Deterioration, and \$655,500 for Repair and Replacement of Heat and Hot Water Distribution System. (S6). In the cover letter which accompanied the budget revision and was signed by Marguglio, the Authority advised the Newark Office that "the budget revision reflects \$100,000 in legal fees as a result of on going litigation with regards to the exterior elevator prototype Arbitration" and that "[it had] reduced asbestos removal expense by \$100,000 to offset the \$100,000 legal fee expense." (S6;

Girardo, Freiser and Elias had direct and frequent dealings with Respondent. Freiser also testified with somewhat greater specificity than Escobar as to the source of her belief, and her testimony was corroborated by Girardo and Elias. While not dispositive, Respondent neither explicitly denies having prepared the Quarterly Report nor identifies the person who prepared it. In his capacity as the Authority's Management Consultant-Housing Specialist, it is reasonable to conclude that he would be able to identify any such person. It is also consistent with his role of CIAP advisor that he was involved with preparation of the Quarterly CIAP Report. Taking all of the above into account, I find that Respondent prepared or participated in the preparation of the Quarterly CIAP Report.

T 246-47).²⁹

In the Quarterly CIAP Report which followed Budget Revision II, the Authority represented that \$775,890 had been obligated for Asbestos Removal, \$380,000 for Exterior Masonry, and \$570,000 for Heat/Hot Water Distribution. (S 5). In Budget Revision III, which followed the Quarterly Report, the Authority projected a total of \$277,610 for Asbestos Removal, \$380,000 for Exterior Masonry Deterioration, and \$655,500 for Repair and Replacement of Heat and Hot Water Distribution. (S 7).

In a July 1, 1988, letter from the HUD Newark Office to Marguglio concerning, *inter alia*, Budget Revisions II and III, HUD approved the revisions. HUD also questioned, among other things, the reduction of capital improvement funds, or hard costs, for asbestos removal for NJ13-911 by \$722,350, and requested an explanation for the large differential. (S 21; T 245-46, 423-24). Subsequently, in Budget Revision IV, the Authority projected a total of \$277,990 for Asbestos Removal, \$220,000 for Exterior Masonry Deterioration, and \$9,948 for Repair and Replacement of Heat and Hot Water Distribution System. (S 9).

By letter dated March 8, 1989, and sent to Marguglio, the Newark Office acknowledged its receipt of Budget Revision IV. HUD also requested explanations for the Authority's reduction of the funds projected for the Heat and Hot Water Distribution System from \$655,500 to \$9,948 and Masonry Repairs from \$380,000 to \$220,000. (S 27; T 247-50). On April 5, 1989, Respondent prepared a memorandum to file concerning Budget Revision IV. In that memorandum, Respondent stated that he had telephoned the HUD Newark Office about the budget revision and had been questioned about the "sharp reduction in utility line budget item." Respondent further stated that he had "[r]eferred to Engineer's report of May 1987 which indicated work was not necessary" and that "[c]opy of correspondence will be sent to HUD again." (S 11).

As a result of its audit, HUD OIG determined, *inter alia*, that: of the \$775,890 the Authority had represented as obligated in the Quarterly CIAP Report for Asbestos Removal, only \$198,000 had been obligated; of the \$380,000 represented as obligated for Exterior Masonry, only \$198,000 had been obligated; and of the \$570,000 represented as obligated for Heat/Hot Water Distribution, no funds had been obligated. (S 13 at 16).³⁰

²⁹The Authority's attorney was August Michaelis. (T 425). As discussed above, the charges for which Authority employees have pleaded guilty include the payment of kickbacks by Michaelis to Marguglio. (Joint Ex. 1, Stip. No. 7).

³⁰Funds for other items were reported as obligated by the Authority when, in fact, they were not. As

C. Proration of CIAP Salaries Based on Budget Estimates Rather than Actual Time

By memorandum dated June 30, 1987, Respondent advised Marguglio that during a June 17, 1987, telephone conversation with Phoebe Ellis, a Housing Management Specialist with the HUD Newark Office, he had given a breakdown of administrative charges for NJ13-911. In that memorandum, Respondent stated that the breakdown "was based upon past CIAP proration or prior approved modernization programs" (S 12; T 59).

III. The LDP Previously Issued to Respondent

On January 22, 1990, the HUD Newark Office issued a Notice of LDP to Respondent. (S 15). In the notice, Respondent was advised that the basis for the LDP was

your actions, as Management Consultant-Housing Specialist engaged by the Housing Authority, as to the Housing Authority Board and the Housing Authority staff, which resulted in material violations by the Housing Authority of regulatory, program and/or ACC contract requirements with respect to CIAP fund applications and treatment, including but not limited to the overstatement of the obligation of CIAP funds, and with respect to the preparation and submission of Housing Authority Budgets; or, in the alternative, your failure to advise the said Board and staff so as to avoid such violations, such advice being within your duties and concerning matters which were within your knowledge, or should have been within your knowledge as Management Consultant-Housing Specialist for the Housing Authority.

Id. At Respondent's request, a conference was held before the HUD Newark Office to contest the LDP on March 8, 1990. (S 16). By letter dated March 23, 1990, the LDP was sustained on the basis of Respondent's involvement in the three audit findings discussed above, as well as on evidence of his failure to disclose the irregularities in the conduct of the Authority's employees to either its Board of Commissioners or HUD. *Id.* Essentially, these are the same determinations which constitute the allegations of the

stated above, the Authority reported \$3,377,190 as obligated in the Quarterly Report, when only \$1,955,050 had been obligated. (S 13 at 16; Joint Ex. 1, Stip. No. 5).

Department's Complaint in this proceeding.

Discussion

The purpose of debarment is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal government. See 24 CFR 24.115(a). See also *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. See 24 CFR 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. See 24 CFR 24.305. See also *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by continuing to do business with a respondent. See *Shane Meat Co., Inc. v. United States Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. See *Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. United States Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

I. Respondent is Subject to HUD's Debarment Regulations

Respondent is subject to the Department's debarment regulations codified at 24 CFR Part 24 because he meets the definition of a "participant" and "principal" involved in "covered" transactions within the meaning of 24 CFR secs. 24.105(m) and (p), and 24.110(a). The Authority, for which Respondent served as Management Consultant-Housing Specialist, receives substantial funding from HUD. In light of his service in that capacity, Respondent reasonably may be expected to enter into a covered transaction, and has a critical influence on or substantive control over a covered transaction.

II. Cause Exists to Debar Respondent

The Department summarizes its charges against Respondent as follows:

- 1) Respondent prepared and processed, or caused to be prepared and processed, misleading and deceptive CIAP Budgets and Salary Schedules which failed to disclose that [Authority] employees received payments for services

allegedly performed, while they occupied other positions with the Authority which required 100% of their time.

2) Respondent prepared, or caused to be prepared, [Authority] budgets, requisitions and applications for CIAP, in which CIAP funds were stated to have been obligated, when these funds were not so obligated.³¹

3) Respondent failed and neglected to properly allocate salaries and other administrative expenses in the CIAP budget among various Authority employees and activities. This resulted in the improper use and application of CIAP funds to pay administrative and operating expenses of the Authority.

4) Respondent failed and neglected to advise the Authority's Board of Commissioners or HUD of the irregularities and non-compliance with the rules and regulations regarding the CIAP program engaged in by the Authority's officers and employees

Department's Brief at 4.

Sections 24.313(b)(3) and (b)(4) of 24 CFR provide that the Department has the burden of proof for establishing cause for debarment, and that cause must be established by a preponderance of the evidence. As discussed below, the Department has met its burden of establishing cause for debarment as to each of the four charges it has enumerated.

A. Charge No. 1 - Improper Payment of Multiple Salaries

³¹ As discussed above, obligated funds were set forth on the Quarterly CIAP Report. The charge was addressed at the hearing and in the parties' post-hearing briefs accordingly.

Contrary to the Department's argument, the evidence does not compel the conclusion that Respondent was a knowing participant in the scheme which resulted in the payment of excessive compensation to Authority employees. However, the evidence supports the conclusion that at a minimum, Respondent facilitated the improper payment of excessive compensation through his own nonfeasance. A critical aspect of his nonfeasance was the preparation or participation in the preparation of documents which alone, or in conjunction with other documents, had the effect of obfuscating the improper payment of salaries for multiple job titles. Based on this nonfeasance, cause for debarment exists as to Charge No. 1.³²

³²The Department asserts that Respondent's resistance to the Newark Office's limited management review and in particular, his conduct in connection with the inquiry into multiple salaries, evidences his knowledge of and direct participation in the Authority's improprieties. See Department's Brief at 20-22. In support of this argument, the Department relies on: (1) Respondent's initial discussions with Girardo, during which he raised the "technical" objection that the Authority's decontrolled status prevented HUD from conducting its review; (2) the correspondence, authored by Respondent, in which the Authority "sought to avoid" the review; (3) in connection with the November 15, 1988 review meeting, Respondent's "angry and heated" objection to HUD's inquiry into the multiple salaries, and his silence when Marguglio discussed Glover and Russi's positions; and (4) the Authority's response, authored by Respondent, in which he responded to certain questions concerning the review and demonstrated an "intimate knowledge of the Authority's operations." *Id.*

There is no evidence that the objections Respondent raised to the review were improper, void of any foundation, or otherwise entirely inappropriate. Respondent's silence at the November 15, 1988 meeting is consistent with the finding made above that at a minimum, Respondent facilitated the improper payment of excessive compensation through his own nonfeasance. His oral objections were described by Girardo as "raising his voice and becoming seemingly angry that we were even there." (T 203). Under the circumstances of the review which had become contentious for all parties concerned, his demeanor is not necessarily indicative of knowing and direct participation in the Authority's improprieties. Finally, the Department does not allege that the document authored by Respondent in which he responded to questions concerning the review contains any false or misleading information. Indeed, the response sheds no particular light on the allegations at issue in this proceeding. Thus, the evidence relied upon by the Department does not support a finding of Respondent's knowledge of and direct participation in the Authority's improprieties, and does not lend any additional support for the finding made herein of his nonfeasance.

Respondent prepared or participated in the preparation of documents submitted to HUD which had the effect of hiding the improper payment of salaries.³³ Those documents included Staffing Plan I (S32) and the CIAP Monthly Salary Schedule (S30).³⁴ The documents hid the improper payments by omission or recharacterization of information, rather than by the statement of facially false information.

³³In defense of his conduct Respondent argues, *inter alia*, that as early as 1988 HUD had in its possession documents from which it knew or should have known of the multiple salary payments. See Respondent's Brief at 37-42. Even if HUD knew or had reason to know of the multiple salaries paid by the Authority, Respondent's own inaction is not excused.

Respondent also relies upon the testimony of Elias and Freiser, who acknowledged the difficulty of allocating salaries among a housing authority's various programs. See Respondent's Brief at 42-43, *citing* T 295-96, 428, 467. That the process is "very confusing" and a "bookkeeping nightmare" does not excuse Respondent's conduct. Respondent's background and expertise should have enabled him to perform that task, even if arduous. Moreover, that Marguglio and Pieri actually performed the services for the CIAP program for which they were compensated, and that the amounts they received were not unusual *per se* (see *supra* n.22), does not change the fact that they, among others, received excessive compensation because the requisite reductions were not made from their other salary sources.

³⁴Staffing Plan I listed only the positions of personnel who were assigned to work on the CIAP program; it did not identify the names of the persons who held the positions and the salaries those persons were paid. Because required information was omitted, the Authority was directed by the Newark Office to submit a revised plan which once submitted triggered the Newark Office's inquiry into the payment of salaries for multiple job titles. The CIAP Monthly Salary Schedule, prepared by Respondent and submitted to HUD in support of requisitions for administrative costs, did not include the positions of CIAP Modernization Officer and Modernization Specialist, the two highest paid positions in the Authority's CIAP program, which were held by Marguglio and Pieri, respectively.

Even assuming Respondent prepared these documents at the bidding of others and was unaware of their full import, Respondent at a minimum realized, or should have realized, either that with these documents the Authority would give the impression that something was suspicious with the manner in which it compensated employees, or that the Authority was, in fact, acting improperly.³⁵ Indeed, at least as early as August 19, 1988, Respondent knew the Newark Office had spotted a potential problem, yet he subsequently prepared or participated in the preparation of the CIAP Monthly Salary Schedule. It was within the scope of his contractual duties and actual duties as the Authority's CIAP advisor, as well as within the area of his experience and expertise, to ascertain the existence of the serious impropriety which was occurring, and certainly to take no action which would facilitate the impropriety. Respondent, therefore, is responsible for preparing or participating in the preparation of the misleading and deceptive documents listed above.

Respondent also prepared documents that alone did not hide the impropriety, but which accompanied other documents which did so. Those documents prepared by Respondent included the May 11, 1988 requisition which was accompanied by an unsigned handwritten list of positions and salaries (S 18), and the August 8, 1988 cover letter which accompanied Staffing Plan II (S 23).³⁶ Even assuming Respondent had no direct role in the preparation of the unsigned handwritten list of positions and Staffing Plan II, in preparing the requisition and cover letter, Respondent knew or should have known, based on the nature and scope of the documents he prepared, as well as his experience and duties, that supporting documentation was to be attached or was likely to be attached to the primary documentation he prepared. Because he was responsible for the preparation of the primary documentation, he should have reviewed the supporting

³⁵The Department asserts that in preparing Staffing Plan I, Respondent would necessarily have known of the staffing in the operating budget since CIAP staff positions overlapped Authority positions, and that such knowledge demonstrates his complicity in the multiple payment scheme. See Department's Brief at 20, citing T 447-50. Staffing Plan I was prepared in or about August 1988, and the only operating budget document introduced into the record is the Operating Budget Salary Schedule (S 4) for the year ending December 31, 1988. As discussed above, although Respondent was responsible for preparation of the Operating Budget Salary Schedule, there is insufficient evidence upon which to base a finding that he prepared the schedule or participated in its preparation. See *supra* n.20. Moreover, although Respondent provided OIG with a copy of the Operating Budget Salary Schedule in connection with the audit, there is no evidence of whether he had seen it previously. Thus, no finding can be made that Respondent had knowledge of the staffing in the operating budget at the time he prepared Staffing Plan I.

³⁶Specifically, it was the unsigned handwritten list of positions and salaries (S 18) which prompted the Newark Office to request more information, including a payroll report listing employees, time allocated to the CIAP program, and the charges to be reimbursed. Staffing Plan II was the document on which the Authority designated the positions of CIAP Modernization Officer and Modernization Specialist as "Pending Funding" (S 23).

documentation. Had he done so, assuming he did not, he would have been made aware of further indicia that improprieties were occurring. His conduct in connection with the preparation of the May 11, 1988 requisition and the August 8, 1988 cover letter, therefore, further demonstrates cause for debarment.³⁷

Finally, as discussed above, although there is insufficient evidence upon which to base a finding that Respondent prepared or participated in the preparation of the Operating Budget Salary Schedule (S 4), Respondent was responsible for its preparation. When first provided to OIG by Respondent, the document did not identify the persons who encumbered the listed positions. It was only after OIG had returned the document to the Authority so that it could fill in the names of the employees holding the positions that the payment of salaries for multiple job titles was revealed. Thus, assuming he did not prepare the Operating Budget Salary Schedule, he either reviewed it and knew of its content, or failed to review it as was his duty. If he reviewed the Operating Budget Salary Schedule he should have been made aware of further indicia that improprieties were occurring. If he did not review it, he facilitated the preparation of a misleading document by virtue of his nonfeasance. His conduct in connection with the Operating Budget Salary Schedule is therefore another demonstration of cause for debarment.

B. Charge No. 2 - Misreporting of Funds as Obligated

³⁷The findings made as to the May 11, 1988 requisition are consistent with the Department's acknowledgement that "[t]he operation of the RHPS system was not a finding in HUD's audit report (T-149)." See Department's Brief at 22.

Respondent prepared or participated in the preparation of the Quarterly CIAP Report which reported \$3,377,190 as obligated when only \$1,955,050 had been obligated. As stated earlier, the HUD Handbook provides that CIAP funds may only be shown as obligated when CIAP contracts are awarded. If funds are approved but not obligated, they can be recaptured by HUD or, with HUD's approval, can be otherwise used by the housing authority. Thus, in addition to the significance of submitting incorrect information in contravention of the HUD Handbook, there is a consequence to HUD of reporting funds as obligated when they are not. HUD would not be on notice that it could recapture the funds.³⁸

Respondent also prepared Budget Revision II, which preceded the Quarterly Report, and Budget Revision III, which followed the Quarterly Report. Budget revisions do not set forth obligated funds but rather, set forth expenditure projections. Thus, Respondent's preparation of these budget revisions, *per se*, are not acts which constitute cause for debarment under Charge No. 2. However, his preparation of those documents, in conjunction with his involvement in the preparation of the Quarterly CIAP Report, demonstrates that, at a minimum, he had reason to question the Authority's intended use of CIAP funds and, therefore, the Authority's reporting of funds as obligated.

³⁸ As noted by Respondent, there is no evidence of any financial benefit to the Authority as a result of its misreporting of obligated funds. See Respondent's Brief at 19-20. Indeed, as discussed above, funds are not available for expenditure by an authority merely because they have been approved and obligated.

Most significantly, Budget Revision II shifted \$100,000 that had been allocated for asbestos removal to legal fee expenses.³⁹ Budget Revision III provided \$277,160 for asbestos removal, \$722,350 less than had been provided for in Budget Revision II, and \$498,280 less than had been reported as obligated in the Quarterly CIAP Report.⁴⁰ While there was no testimony that such changes were improper *per se*, the fact that they involved significant sums of money made them warning signs of a problem.⁴¹

As discussed *supra* n.27, there is insufficient evidence upon which to base a finding that Respondent prepared or participated in the preparation of Budget Revision IV. However, based on the explicit language of his contracts with the Authority, Respondent was responsible for its preparation. Thus, even assuming Respondent did not prepare or participate in the preparation of Budget Revision IV, he is responsible for its content. Had he reviewed its content, assuming he did not, he would have been aware of further indicia of a problem based on the substantial reductions in expenditures that had been projected for repair and replacement of the heat and hot water distribution system and masonry repairs. Thus, at a minimum, through his own nonfeasance, he was unaware of

³⁹According to the Department, Respondent "facilitated a fraud upon the Government" in connection with the \$100,000 shifted in Budget Revision II from asbestos removal to legal fees. See Department's Brief at 27-28. There is no evidence which supports a finding that Respondent knew or should have known of the particular criminal conduct involved in Michaelis' payment of kickbacks to Marguglio. See *supra* n.29. However, by not acting on the warning signs of problems with the Authority's reporting of obligated funds, Respondent at a minimum unknowingly facilitated the fraudulent conduct.

⁴⁰The Department relies on the May 14, 1987 letter from LAN Associates in asserting that Respondent was aware that repair work on the heat and hot water distribution system was unnecessary when he prepared or participated in the preparation of Budget Revision II, the Quarterly CIAP Report, and Budget Revision III. I need not reach the issue raised by Respondent that the letter does not conclusively indicate that the work was unnecessary because there is no evidence that Respondent knew of the letter when he prepared those documents. See Respondent's Brief at 18. The evidence does not demonstrate that Respondent knew of the letter prior to April 5, 1989. The letter was addressed to Pieri's attention, with copies to Marguglio and others, but not to Respondent. The only evidence concerning Respondent's knowledge of the letter is his April 5, 1989 memorandum to Marguglio in which he refers to the May 14, 1987 letter, but does not state how or when he became aware of the letter. Accordingly, the evidence concerning the LAN Associates letter does not lend additional support for the finding of cause as to Count No. 2. Similarly, the August 19, 1987 letter from the HUD Newark Office in which it advised that 1986 CIAP designated as emergency had to be obligated by December 30, 1987 or it would be recaptured, was sent to Pieri. There is no evidence when, if ever, Respondent was made aware of its content. The August 19th letter, like the LAN Associates letter, does not support the finding of cause for Count No. 2.

⁴¹Indeed, in a July 1, 1988 letter to Marguglio the HUD Newark Office expressed concern regarding the reduction of funds for the hard cost of asbestos removal in Budget Revision III. (S21; T 245-46, 423-24). There is no evidence that Respondent was aware of the letter at the time it was sent and therefore on actual notice of a problem by virtue of the letter. However, the letter does demonstrate that Respondent should have discerned the existence of a problem, as did the Newark Office.

further warning signs of a problem.⁴²

Respondent's contracts with the Authority vested in him the responsibility to review all HUD handbooks to "insure the Authority's compliance...." (S 14(A), S 14 (B)). Thus, he knew or should have known of the HUD Handbook requirement concerning the reporting of funds as obligated. He was aware or should have been aware of the indicia of a problem with the Authority's reporting of obligated funds and related projected expenditures. He therefore should have taken all necessary steps to ascertain that funds reported as obligated were in fact obligated, and is responsible for the reporting of incorrect information concerning obligated funds to HUD.

⁴² Although there is no evidence that Respondent was aware of the March 3, 1989 letter to Marguglio from the Newark Office at the time it was sent, the letter demonstrates that had Respondent reviewed Budget Revision IV, assuming he did not, he could have discerned the existence of a problem with the Authority's reporting of obligated funds. In that letter, the Newark Office requested additional information concerning the reduction in funds in Budget Revision IV for the repair and replacement of the heat and hot water distribution system from \$655,500 to \$9,948 and for masonry repairs from \$380,000 to \$220,000. (S 27, T 247-50). The Newark Office took note of a problem, and it is reasonable to expect Respondent to have done the same. Cf. *supra* n.41.

C. Charge No. 3 - Improper Proration of Salaries

In its Audit Report OIG concluded: "For the three years ended December 31, 1988, the [Authority] allocated \$858,0065.64 of salary costs to CIAP. We reviewed the [Authority's] method of prorating salaries to the CIAP and found that there was no support to justify the reasonableness of the payroll allocation." (S 13 at 18). For the three years ended December 31, 1988, the Authority had prorated salaries based on budget estimates rather than time distribution records. *Id.* As discussed above, the Authority's basis for salary proration was in contravention of the HUD Handbook and OMB Circular.

Respondent was responsible for and participated in implementation of the Authority's improper salary prorations. As the Authority's Management Consultant-Housing Specialist, Respondent served as the Authority's advisor on CIAP programs. His contracts with the Authority specifically provide that he was responsible for review of all HUD notices, handbooks and directives to insure the Authority's compliance with HUD rules and regulations. His contract further provides that he was responsible for preparation of budget revisions and modernization correspondence in conjunction with Authority staff modernization budgets, as well as supplemental schedules to the annual operating budget. (S 14(A), S 14(B)). Determining the proper basis for salary proration, and ensuring that basis was implemented, were fully within those actual and contractual duties.

Indeed, a specific finding has been made that Respondent prepared or participated in the preparation of at least one document which entailed salary proration. That document is the CIAP Monthly Allocation of Salaries (S 30). Finally, Respondent's own memorandum to Marguglio dated June 30, 1987 (S 12) further demonstrates his knowledge of the basis upon which the Authority prorated salaries. In that memorandum, Respondent advised Marguglio that on June 17, 1987, he had given Newark Office Housing Management Specialist Ellis a breakdown of administrative charges for NJ13-911, and that the breakdown was based upon "past CIAP proration or prior approved modernization programs," rather than actual time distribution records.

D. Charge No. 4 - Failure to Advise Authority's Board of Commissioners

The Department asserts in its post-hearing brief that cause exists to debar Respondent for his failure to advise the Authority's Board of Commissioners or HUD of the "irregularities" in the Authority's CIAP program. According to the Department, Respondent was in a relationship of trust and confidence with the Authority. Respondent, the Department argues, thereby owed a fiduciary duty to the Authority, which he breached by not disclosing to the Board all material facts related to the irregularities in the Authority's CIAP program. See Department's Brief at 31-32.

In its Complaint, the Department limited this charge to a failure to advise only the Board of Commissioners. (Complaint, para. 52). In denying this charge, Respondent states in his Answer that he "had no knowledge of any irregularities in the CIAP program." (Answer, para. 52). Respondent similarly states in his post-hearing brief that "the hard facts do not prove that [he] knew, or should have known, that those persons who were managing the...Authority were doing anything wrong." See Respondent's Brief at 47-48. Thus, he does not dispute that he was in a relationship of trust and confidence with the Authority and that he owed a duty to the Authority. Rather, he argues that the duty owed was not breached since he neither knew or should have known of the irregularities.

As discussed above, even if Respondent had no direct knowledge of the existence of a scheme to pay full-time Authority employees salaries for multiple positions with the CIAP program, Respondent had knowledge, as well as should have had knowledge, sufficient to put him on notice that the manner in which employees were being compensated was of questionable propriety. Respondent also prepared or participated in the preparation of the Quarterly CIAP Report in which the Authority reported CIAP funds as obligated when they were not. He also knew or should have known that the Authority was using an improper basis for salary proration. Thus, even assuming Respondent had no knowledge of the criminal conduct for which certain Authority employees ultimately pleaded guilty, Respondent breached the duty he owed the Authority by not disclosing to the Board the irregularities of which he had or should have had knowledge. Those irregularities were significant and were warning signs that the CIAP program was being administered improperly and perhaps even unlawfully.

Because the Department in its Complaint did not charge Respondent with a breach of any duty owed to HUD, and because I find, in any event, that Respondent breached his duty to the Authority's Board of Commissioners, I need not reach the issue of whether he owed and breached any similar duty to HUD.

E. Cause is Established Under 24 CFR 24.305(b) and (f)

The Department seeks to debar Respondent under 24 CFR 24.305(b), (d), and (f). Subsections (b) and (f) provide that debarment may be based upon:

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program....

(f) ...material violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications for grants, financial assistance, insurance or guarantees, or to the performance of requirements under a grant, assistance award or conditional or final commitment to insure or guarantee.

Respondent's conduct in connection with the four charges constitutes cause for debarment under 24 CFR 24.305(b) and (f).⁴³ He violated or allowed the violation of applicable federal statutes and regulations as well as the ACC and provisions of the applicable HUD Handbook and OMB Circular. Those violations were material and were so serious as to affect the integrity of HUD's CIAP program.

III. Respondent's Conduct is Serious and There is No Evidence Upon Which to Base A Reduction of the Period of Debarment

Although cause may exist to debar a respondent, a debarment cannot stand simply and solely on the evidence sufficient to establish such cause. Debarment is discretionary. It is therefore necessary to consider what the evidence shows about the seriousness of Respondent's conduct, as well as any evidence in mitigation. See 24 CFR 24.115(d), 24.300. The respondent has the burden of proof for establishing mitigating circumstances. 24 CFR 24.313(b)(4).

Respondent is a former HUD employee, and by all accounts well versed in the regulatory arena of public housing authorities. Indeed, it was on the basis of those qualifications that he was able to enter the private sector as a consultant. As demonstrated throughout his able *pro se* defense, he is neither naive nor ingenuous. Thus, he knew or should have known of the irregularities being committed, and his failure to act accordingly demonstrates, at a minimum, a serious dereliction of his duties. Respondent's conduct with regard to the four charges discussed above therefore demonstrates a serious lack of present responsibility.

Respondent proffered no evidence in mitigation. He asserts in his post-hearing brief, however, that "[t]he Court should be mindful that [he] served as the liaison between the OIG Auditors and cooperated in providing them with information they requested from him." According to Respondent, a result of that cooperation was "the successful completion of the OIG investigation into the practices at the Passaic Housing

⁴³Having concluded that cause for debarment exists under 24 CFR 24.305(b) and (f), I need not reach whether cause for debarment exists under subsection (d).

Authority." See Respondent's Brief at 50. Although not set forth as factors favoring mitigation *per se*, Respondent states in his Answer:

I am 48 years old. I have held responsible positions for more than 25 years. I have never broken the law or have been fired.

Since HUD's sanction, I have not been able to support my family. I have lost my career. The allegations against me are vague and false. I ask for relief. It is unlikely I can resume my career in housing as I have been stigmatized by what has occurred [sic] in Passaic. This sanction is an obstacle in my starting a new career outside housing.

Although Respondent's cooperation in the OIG investigation is laudatory, it does not excuse his own conduct which played a significant part in the Authority's practices which were the focus of the OIG investigation. The effect a debarment will have on Respondent's prospects for future employment and his ability to support his family is the unfortunate but unavoidable consequence of his actions if the government is to be protected and the public interest is to be served.⁴⁴

Significantly, Respondent attempts to avoid responsibility for his conduct by asserting that Marguglio and Pleri benefitted financially from "their own lies," that he was paid a "standard consultant's salary", and that "[t]here is not a scintilla of evidence indicating that [he] received any wrongful financial benefit." Respondent's Brief at 49. While there is no evidence that the amount Respondent was compensated was unlawful, his conduct must be assessed in light of the facts that he benefitted from continued service with the Authority as its consultant and that after the Department took over the Authority, in-house employees rather than an outside consultant performed his duties.⁴⁵

⁴⁴ Respondent recites the following quotation from Shakespeare's Othello in his brief:

Who steals my purse steals trash;...
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

Respondent's Brief at 1.

Perhaps Respondent should consider the lesson, "[e]very man is the architect of his own fortune." Sallust, speech to Caesar on the state (1st c. B.C.).

⁴⁵ (T 137-38).

Thus, contrary to the picture painted by Respondent, his conduct cannot be considered void of motivation.

Debarment is a serious action which must be used only in the public interest and for the federal government's protection, and not for the purposes of punishment. 24 CFR 24.115(b). The period of debarment must be commensurate with the seriousness of the causes. *Id.* at 24.320(a). For the causes established in this proceeding, the period of debarment generally should not exceed three years. *Id.* at 24.320(a)(1). Here, Respondent's conduct was serious, and Respondent has not demonstrated any mitigating factors. A three-year period of debarment is therefore warranted.

Conclusion and Order

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that cause exists to debar Brian Kennedy from participation in primary covered transactions and lower tier covered transactions, as either a participant or principal at HUD and throughout the Executive Branch of the Federal government, and from participation in procurement contracts with HUD, for a period of three years from the date of his limited denial of participation on January 22, 1990, and it is therefore

SO ORDERED.

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: February 21, 1992

CERTIFICATION OF SERVICE

I hereby certify that copies of this ORDER issued by ROBERT A. ANDRETTA, Administrative Law Judge, HUDALJ 90-1644-DB, were sent to the following parties on this 21st day of February, 1992, in the manner indicated:

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